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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of MOHAMMAD and POURAN HONARKAR.	
MOHAMMAD HONARKAR, Respondent, v. POURAN HONARKAR, Appellant.	G048075 (Super. Ct. No. 00D008576) O P I N I O N

Appeal from an order of dismissal of the Superior Court of Orange County, Lon F. Hurwitz, Judge. Reversed. Request for judicial notice. Denied.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Appellant.

Ignacio J. Lazo for Respondent.

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INTRODUCTION

Mohammad Honarkar and Pouran Honarkar had been married for 16 years when Mohammad filed a petition to dissolve the marriage.[1] After the petition was filed, Mohammad and Pouran reconciled, and nothing happened in the dissolution proceeding for almost six years. After Mohammad and Pouran split up again, Pouran began actively litigating the dissolution proceeding. More than six years after the petition was filed, the trial court issued a spousal support order.

The case continued to move along at a snail's pace, until the trial court, on its own motion, dismissed the case, pursuant to Code of Civil Procedure section 583.310, for failure to bring the action to trial within five years of its initiation. (All further statutory references are to the Code of Civil Procedure, unless otherwise noted.) The court further found that the spousal support order, which had been issued more than five years after the dissolution petition was filed, was void ab initio. Pouran appeals.

We conclude that because a spousal support order had been issued and had not been terminated, the court could not dismiss the case for failure to bring it to trial, pursuant to section 583.161, subdivision (b). Additionally, it would be impossible, impracticable, or futile to bring a dissolution proceeding to trial while the parties are reconciled. Therefore, the five-year period within which the case had to be brought to trial was tolled during Mohammad and Pouran's reconciliation, pursuant to section 583.340, subdivision (c). We therefore reverse the order dismissing the case.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mohammad and Pouran were married in July 1984. In September 2000, Mohammad filed a petition for dissolution of their marriage; at that time, the parties had two minor children, ages 12 and 10. In the petition, Mohammad alleged the parties had

[1] We will use the parties' first names to avoid confusion; we intend no disrespect.

separated in June 2000. Pouran filed a response to the petition, alleging the parties had not separated. After Pouran's response, not a single document was filed in the action for almost six years.

In August 2006, Pouran filed an amended response, in which she alleged the parties had separated in December 2005. Pouran filed an order to show cause regarding custody and support in September 2006. Mohammad did not file a response, although he did file an income and expense declaration. Mohammad did not appear at the hearing on the order to show cause in November 2006; the court found the moving papers had been validly served on him.[2] The court ordered (1) the parties were to have joint legal and physical custody of the minor child (one child was 16 years old at that time; the other had reached age 18); (2) Mohammad was to pay Pouran $5,805 per month in child support; (3) Mohammad was to pay Pouran $19,000 per month in spousal support; (4) the parties were restrained from transferring or encumbering any real or personal property, and from incurring any debts or liabilities for which the other might be held liable; (5) all proceeds from the sale of any community property were to be held in trust by Pouran's attorney; and (6) Pouran's request for attorney fees and costs was reserved for a further hearing.

In February 2013, on its own motion, the court dismissed the case pursuant to section 583.310. The court found that the November 2006 order regarding support was void because it had been issued more than six years after the petition had been filed.[3] Pouran timely appealed.

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[2] In his appellate brief, Mohammad claims the support order was issued against him by default. Mohammad's failure to appear at a hearing, of which he received notice and at which he could have appeared, does not turn the proceeding into a default proceeding.

[3] The court's minute order reads, in relevant part, as follows: "Court orders this case dismissed under CCP 583.310. Court finds no exceptions under CCP 583.161 or CCP 583.140. Court finds that there was no jurisdiction to make orders as to child or

DISCUSSION

I.

STANDARD OF REVIEW

An order dismissing a case for failure to bring the action to trial within five years of commencement is reviewed for abuse of discretion. (*Sagi Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 447.) "[W]hen a trial court's decision rests on an error of law, that decision is an abuse of discretion." (*People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 746.) To the extent that the resolution of any issue in the case depends solely on statutory interpretation, it is subject to independent, de novo review. (*Kevin Q. v. Lauren W.* (2009) 175 Cal.App.4th 1119, 1137.)

II.

THE TRIAL COURT ERRED BY DISMISSING THE CASE.

In general, every action must be brought to trial no more than five years after its inception. (§ 583.310.) This case was initiated in September 2000; the presumptive date by which the five-year statute expired was in September 2005. After the five-year mark passes, the trial court may dismiss the case on motion: "(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article. [¶] (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute." (§ 583.360, subds. (a), (b).) Thus, the statute provides that although dismissal of a case that has not been brought to trial within five years is mandatory, certain statutory exceptions apply.

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spousal support in 2006 without any tolling and having been issued more than 6 years after filing of the Petition. To the extent those orders were made they are void ab initio."

In this case, an exception to the five-year dismissal rule applies to a dissolution proceeding in the family law court; namely, a valid spousal support order prohibits the court from dismissing the case. "A petition filed pursuant to Section . . . 2330 . . . of the Family Code shall not be dismissed pursuant to this chapter if any of the following conditions exist: [¶] . . . [¶] (b) An order for spousal support has been issued in connection with the proceeding and the order has not been terminated by the court." (§ 583.161, subd. (b).) Here, a spousal support order was issued in connection with the dissolution proceeding initiated by Mohammad, and had not been terminated before the trial court dismissed the case. The spousal support order itself was issued after the expiration of the five-year period. Nothing in the statute, however, provides that a spousal support order, issued after the five-year period has run, is ineffective as an exception to dismissal under section 583.360. This is especially true given the specific facts of this case, and, in particular, the parties' lengthy reconciliation, discussed *post*. Therefore, the spousal support order that was issued by the trial court in November 2006 was not void.

In his respondent's brief, Mohammad cites several inapposite cases. Mohammad argues the trial court had the inherent authority to reconsider the spousal support order, citing *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108 ["If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief"].) In this case, the court did not reconsider the support order or determine that it was erroneous. The court simply determined that the order *must* be void ab initio because it was issued more than five years after the case was initially filed.

Mohammad also argues that section 583.360 is jurisdictional, and the spousal support order was thus inherently void because it was issued after the court lost jurisdiction to rule on anything further in the case. That various exceptions to the five-year rule exist demonstrates the statute is not jurisdictional. A support order that

issues after the five-year mark has passed, but before the court or any party realizes it, is not a judgment void on its face. (See, e.g., *Butler v. Hathcoat* (1983) 146 Cal.App.3d 834, 840 [where a trial is held after the five-year period expires, without prior objection by the defendant, the judgment is not void, and the case is not subject to dismissal].) The numerous cases Mohammad cites, explaining how and why a court may set aside a void judgment, are inapplicable here.[4]

In addition, section 583.340, subdivision (c) provides: "In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed: [¶] . . . [¶] . . . Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." This exception to dismissal also applies here because the parties could not, with reasonable diligence, get the case to trial.

"In determining whether the [impossible, impracticable, or futile] exception applies, the trial court must consider '"all the circumstances of a particular case, including the conduct of the parties and the nature of the proceedings. The critical factor is whether the plaintiff exercised reasonable diligence in prosecuting its case. [Citation.] The statute must be liberally construed, consistent with the policy favoring trial on the

[4] Pouran filed a request for judicial notice of a letter from Mohammad's counsel to Pouran's counsel, in which Mohammad's counsel relies on the validity of an order issued by the trial court more than five years after the date the dissolution petition was filed (not the order regarding spousal support). Under Evidence Code section 452, subdivision (h), a court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." In *People v. Vigil* (2008) 169 Cal.App.4th 8, 12 and footnote 2, the appellate court took judicial notice of a letter from an attorney to the State Bar tendering his resignation on a date specific, which was included in the attorney's State Bar records; an issue in the criminal appeal was whether the attorney was admitted as an active member of the bar throughout the defendant's criminal trial. Here, the letter between counsel does not meet the standard of Evidence Code section 452, subdivision (h). We therefore deny the request to take judicial notice.

merits." [Citation.]'" (*Jordan v. Superstar Sandcars* (2010) 182 Cal.App.4th 1416, 1420-1421.)

As the court in *Gaines v. Fidelity National Title Ins. Co.* (2013) 222 Cal.App.4th 25, 38, recently explained: "The section 583.340, subdivision (c) exception 'is recognized because the purpose of the five-year statute is to prevent *avoidable* delay, and the exception makes allowance for circumstances beyond the plaintiff's control, in which moving the case to trial is impracticable for all practical purposes.' [Citation.]"

A party claiming application of the section 583.340, subdivision (c) exception must demonstrate a causal connection between the circumstances on which the party is relying and the failure to bring the action to trial within five years. (*Sanchez v. City of Los Angeles* (2003) 109 Cal.App.4th 1262, 1272.)

Here, the issue is whether it would be impossible, impracticable, or futile to bring the case to trial within five years because Pouran and Mohammad had reconciled after the dissolution petition was filed. We conclude that it would. We further conclude the appellate record provides sufficient factual information to allow us to decide that the parties' reconciliation prohibits dismissal. In relevant part, Pouran's declaration in opposition to dismissal provides as follows:

" . . . On September 8, 2000, Mohammad filed a Petition for Dissolution of Marriage ('Petition'). . . .

" . . . On September 28, 2000, I filed a Response to the Petition. . . .

" . . . In May 2001, Mohammad and I 'reconciled'. I agreed to try and 'reconcile' as a result of the continuing threats he made about sending [me] back home to Iran and not allowing me to see our daughters again. Also, he had complete control over all our finances. Thus, I felt that unless I complied with his demands I would be virtually penniless and unable to care for myself and my children. Finally, Mohammad promised to change and be a better husband and father.

" . . . Between 2001 and 2005, Mohammad and I purchased several properties and started new businesses. Notably, most of this was done without my knowledge and or consent. In fact, it was not uncommon for Mohammad to tell me to sign documents without explaining them to me or why I needed to sign them. Yet, in order to avoid a confrontation with him, I did as he said.

" . . . After another abusive incident, I separated once and for all from Mohammad . . . in June 2006.

" . . . On August 14, 2006, I filed an Amended Response with a new date of separation. . . ."

Attached to Pouran's declaration was a copy of her trust, which was established on February 10, 2006, after Mohammad revoked their family trust. Pouran's trust identifies Mohammad as her spouse, but states that she "is legally separated from him at this time."

Mohammad filed two declarations in these proceedings after August 2006, in which he averred that he and Pouran reconciled soon after the dissolution petition was filed, and that they separated for good on December 31, 2005.

Based on the parties' declarations, we conclude that it was impossible, impracticable, or futile to have brought the case to trial between May 31, 2001 and December 31, 2005 (a total of 55 months), and that the five-year period within which a case must be brought to trial was tolled during that period.[5] The five-year statute would have run on July 31, 2009, absent another exception to the rule. The spousal support order, issued in November 2006 (before the five-year statute would have run), prevents dismissal.

[5] Suffice it to say that the parties' misuse of the judicial system is not to be encouraged. When parties reconcile after initiating a dissolution proceeding, the preferred procedure is to dismiss the petition.

The trial court abused its discretion by dismissing the case pursuant to section 583.360. This case falls within the exceptions to dismissal found in section 583.161, subdivision (b) and in section 583.340, subdivision (c) coupled with section 583.161, subdivision (b).

DISPOSITION

The order of dismissal is reversed. Appellant to recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.